

Forest Service Agreement # 02-MU-11015600-009
EPA Agreement #

MEMORANDUM OF UNDERSTANDING
between
USDA FOREST SERVICE, NORTHERN REGION
and
U.S. ENVIRONMENTAL PROTECTION AGENCY, REGION VIII

**REGARDING ABANDONED MINE LAND RESPONSE ACTIONS IN THE
BASIN, CATARACT, TENMILE, AND NEARBY WATERSHEDS WITHIN
JEFFERSON, POWELL AND LEWIS AND CLARK COUNTIES, MONTANA**

This Memorandum of Understanding ("MOU") is hereby entered into by and between the USDA Forest Service, Northern Region, hereinafter referred to as the Forest Service, and the United States Environmental Protection Agency, hereinafter to referred to as EPA or when referenced together, as the Agencies.

I. PURPOSE:

This MOU is intended to provide the framework and responsibilities for intra governmental coordination among the Federal Agencies regarding the development, selection, implementation, and oversight of certain response activities authorized under the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), 42 U.S.C. Sections 9601, et seq. within the Upper Tenmile Creek, Upper Boulder River, Upper Little Blackfoot, Prickly Pear Creek, Elkhorn Creek, and nearby watersheds (the "Watersheds").

II. STATEMENT OF MUTUAL BENEFIT AND INTEREST:

A. The Watersheds include both private lands, and lands and interests in lands currently under the jurisdiction, custody, or control of the United States, designated as National Forest System lands administered by the Forest Service. Historic mining and milling operations conducted under the 1872 Mining Law, 30 U.S.C. Section 21, et seq., in the Watersheds, have resulted in releases or substantial threats of releases for hazardous substances, pollutants, or contaminants, within the meaning of CERCLA.

B. Tenmile and Basin Watersheds are designated as municipal watersheds and EPA has placed them, along with the Cataract Creek Watershed, on the National Priority List ("NPL") as the Upper Tenmile Creek Mining Area Superfund Site and the Basin Mining Area Superfund Site.

C. The purpose of this MOU is to provide a framework for coordination between the Agencies regarding the development, selection, implementation, oversight and funding of



CERCLA response activities within the Upper Tenmile Creek Mining Area and Basin Mining Area Superfund Sites.

D. It is the mutual desire of EPA and the Forest Service to promote administrative efficiency and work as partners to leverage their authorities and resources to increase the effectiveness of the CERCLA response activities within the Watersheds.

III. RECITALS:

A. Pursuant to CERCLA, the President is responsible for responding to releases of hazardous substances to protect the public health or welfare or the environment.

B. Pursuant to Executive Order 12580, as amended by Executive Order 13016, the President delegated authority to conduct various activities under CERCLA, including investigations and response activities (42 U.S.C. 9604), cost recovery (42 U.S.C. 9607), and entering into agreements with potentially responsible parties ("PRPs") (42 U.S.C. 9622), to the heads of several executive departments and agencies, including EPA and the United States Department of Agriculture ("USDA").

C. The Secretary of Agriculture has delegated his authorities under Executive Order 12580 to the Forest Service with respect to land and facilities under Forest Service jurisdiction. 7 C.F.R. 2.60(a)(39).

D. The Forest Service administers National Forest System ("NFS") land and is, with certain limitations, delegated the President's CERCLA authority where a release of a hazardous substance is on or the sole source of the release is from a facility under the jurisdiction, custody or control of the Forest Service. Executive Order 12580, secs. 2(e)(1) and 4(b)(1). Executive Order 13016 amends Executive Order 12580 to authorize Forest Service use of CERCLA Section 106 authority to address releases or threats of releases of hazardous substances affecting lands and natural resources under the Forest Service's custody, jurisdiction and control, subject to the concurrence of the Administrator of the EPA. Executive Order 13016, Section 2. The Forest Service's CERCLA role is also recognized in various provisions of the National Oil and Hazardous Substances Pollution Contingency Plan ("NCP"). 40 C.F.R. Part 300.

E. The President's CERCLA authority related to private land is generally delegated to EPA. Executive Order 12580, Sections. (2)(g) and 4(d). The authority delegated to EPA includes the President's authority under 42 U.S.C. Section 9606(a) to issue such orders as may be necessary to protect public health and welfare and the environment. Executive Order 12580, Section 4(d)(1).

IV. EPA SHALL:

A. For EPA lead projects that occur on or that may affect NFS lands or natural resources for which the Forest Service may be a natural resource trustee, EPA will request Forest Service concurrence on the following major decision points, or on related decision points:

1. RI/FSs, EE/CAs, work plans, reclamation plans, sampling and analysis plans, transportation plans, and road design.
2. The Community Involvement Plan.
3. Selection of any removal alternative including but not limited to:
 - a. Selection of cleanup standards.
 - b. Selection of the operations and maintenance requirements for completed response actions.
 - c. Selection of ARARs.
4. Any Action Memoranda.
5. Any removal design plans.
6. Proposed Plans and RODs.
7. Cost Estimates
8. Remedial Design and Remedial Action construction completion reports, Remedial Action completion reports, and O&M monitoring plans.
9. Any certifications of completion issued for response actions.

B. In the absence of funding from PRPs, EPA shall be responsible for 100% of the costs of projects (or portions thereof, with respect to mixed-ownership sites), excluding costs associated with operation and maintenance, to be conducted on private lands.

V. FOREST SERVICE SHALL:

A. For Forest Service projects that occur in or that may affect the Upper Tenmile Creek Mining Area or Basin Mining Area Superfund Sites, the Forest Service will request EPA concurrence on the following major decision points, or on related decision points:

1. RI/FSs, EE/CAs, work plans, reclamation plans, sampling and analysis plans, transportation plans, and road design.
2. The Community Involvement Plan.
 - a. Selection of cleanup standards.
 - b. Selection of the operations and maintenance requirements for completed response actions.
 - c. Selection of ARARs.

4. Any Action Memoranda.
5. Any removal design plans.
6. Proposed Plans and RODs.
7. Cost Estimates
8. Remedial Design and Remedial Action construction completion reports, Remedial Action completion reports, and O&M monitoring plans.
9. Any certifications of completion issued for response actions.

B. In the absence of funding from PRPs, the Forest Service shall be responsible for 100% of the costs of projects to be conducted on NFS lands.

VI. IT IS MUTUALLY AGREED AND UNDERSTOOD BY THE AGENCIES THAT:

A. PRINCIPAL CONTACTS. The Agencies have designated the following positions and/or persons who will be involved in the daily coordination, communication and decision making for projects being coordinated under this agreement:

EPA

Mike Bishop - EPA Remedial Project Manager ("RPM") for watershed operable units of both sites.

Jim Harris - EPA RPM for Town of Basin operable unit of Basin Mining Area site.

Steve Way - EPA On-Scene Coordinator ("OSC") for removal actions on Upper Tenmile Creek Mining Area site.

Hays Griswold - EPA OSC for Buckeye/Enterprise and Crystal removal actions.

Suzanne Bohan - EPA attorney for Upper Tenmile and Basin sites.

Forest Service

Bob Kirkpatrick - Forest Service Regional Environmental Engineer for Region 1

Ray Tesoro - Forest Service Regional Abandoned Mine Land Coordinator

Bob Wintergerst - Abandoned Mine Land Coordinator, Beaverhead-Deerlodge National Forest

Kurt Cuneo - OSC, Helena National Forest

Steve Silverman - USDA, Pollution Control Team Attorney, Office of the General Counsel

Each agency will notify and consult with the other as soon as practical regarding plans to change persons or positions.

B. The Agencies shall develop annual work plans or project work plans and meet at least once a year to coordinate each agency's upcoming projects and budgets for responding to releases or potential releases of hazardous substances in the Watersheds.

C. With respect to each project referenced in Paragraph VI.B. above, the Federal Agencies shall mutually identify which agency, EPA or the Forest Service, shall be the lead agency and who shall be the support agency. One factor to be considered is whether the majority of land on which a project is to be implemented is private or NFS land. Other factors should be considered in a manner consistent with the NCP.

D. The Agencies may decide to be co-lead agencies and supply their own OSC/RPM for shared projects that involve response actions on private and NFS lands.

E. The lead agency will coordinate with the support agency during project activities, and will provide the following to the support agency:

1. Copies of requested primary documents, including drafts, deliverables, sampling activities, and other non-privileged documents regarding a given project.
2. Requests outlining the needed support from the supporting agency.
3. Reasonable prior notice of, and an opportunity to participate in, any scheduled meetings, including teleconferences, related to project activities. In most cases, reasonable prior notice shall be considered seven (7) days. In the event a meeting needs to be scheduled on a shorter notice, the lead agency OSC/RPM shall contact the support agency Project Coordinator ("PC")/OSC and determine support agency's PC/OSC availability prior to contacting the other parties.

F. In compliance with CERCLA Section 111(e)(3), 42 U.S.C. Section 9611(e)(3), no Hazardous Substances Superfund money will be used for remedial action on NFS lands within the Watersheds.

G. If Hazardous Substances Superfund money is used for removal actions on NFS lands within the Watersheds, the Forest Service shall reimburse EPA in a manner and form mutually agreeable to the Agencies after receipt of EPA's billing for the costs incurred by EPA. Likewise, if Forest Service money is used pursuant to the Forest Service's delegated CERCLA authorities for removal actions on private lands, the Forest Service may request EPA to reimburse the Forest Service in a manner and form mutually agreeable to the Agencies.

H. The lead agency OSC/RPM and the supporting agency PC/OSC or the co-lead OSC/RPMs should communicate regularly, by phone correspondence and meetings, to

review work status and to resolve any existing or anticipated technical or policy issues. Monthly status calls will be held which will include representatives from the EPA and the Forest Service. Contractor representatives should be included when appropriate.

I. The supporting agency will normally provide comments to the lead agency within 21 calendar days of receipt of documents. If the supporting agency PC/OSC determines that additional time is required to provide comments, the supporting agency PC/OSC will discuss the need for a reasonable amount of additional time (normally 15 days or less) with the lead agency OSC/RPM, as soon as that need is identified. The lead agency OSC/RPM may, if necessary, request that the supporting agency agree to a shorter time for a deliverable. If the lead agency OSC/RPM and the supporting agency PC/OSC cannot agree on a review period, the issue will be immediately elevated within each agency, as provided in Paragraph R, and an agreement shall be reached, if practicable, within 48 hours.

J. Resolution of and communication regarding legal issues will be coordinated among EPA counsel and USDA counsel.

K. Informal dispute resolution, through heightened consultation between lead agency OSC/RPM and the supporting agency PC/OSC, should resolve disputed technical issues between the agencies. However, if the lead agency OSC/RPM and the supporting agency PC do not reach agreement on a technical issue, the agencies will use the dispute resolution process set forth in Paragraph R.

L. For Forest Service CERCLA response actions that occur in or that may affect the Upper Tenmile Creek Mining Area or Basin Mining Area Superfund Sites, the actions must be implemented in a manner consistent with all applicable remedial design criteria identified by EPA.

M. For Forest Service CERCLA response actions involving the use of the Luttrell Pit mine waste repository for waste from abandoned mine sites outside the boundaries of the Upper Tenmile Creek Mining Area and Basin Mining Area Superfund Sites, EPA shall provide the Forest Service, when consulting on the applicable Forest Service action memoranda, a determination pursuant to CERCLA Section 104(d)(4), relating to the consolidation of sites and Paragraph 11 of the *Agreement among the United States Environmental Protection Agency, the United States Department of Agriculture, Forest Service, and the Chapter 7 Bankruptcy Estates of Pegasus Gold Montana Mining, Inc. and Pangea Explorations, Inc. regarding Luttrell Pit Mine Waste Repository*.

N. For EPA CERCLA response actions conducted solely on private land and not affecting NFS lands, no Forest Service role is envisioned.

O. Where a project within the Watersheds requires response actions by both Agencies, the Agencies will make every reasonable effort to coordinate schedules and contracting efforts to maximize the efficiency and cost effectiveness of the project.

P. If the lead agency OSC/RPM and the supporting agency PC/OSC do not reach agreement on a decision point listed in Paragraphs M and N or for other disputes between the Agencies arising from activities in the Watersheds, the issue will be elevated to the lead agency OSC/RPM's and supporting agency PC/OSC's direct supervisors within seven days. If the Forest Service and EPA's first line supervisors are unable to reach a decision, the dispute will be further elevated to the Regional Forester for Region 1 of the Forest Service and the Montana Office Director for EPA. If the Regional Forester and the Montana Office Director are unable to resolve the dispute, they can decide to elevate the issue further within each agency.

Q. Pursuant to the *Agreement among the United States Environmental Protection Agency, the United States Department of Agriculture, Forest Service, and the Chapter 7 Bankruptcy Estates of Pegasus Gold Montana Mining, Inc. and Pangea Explorations, Inc. regarding Luttrell Pit Mine Waste Repository*, the Agencies will estimate and measure the volume of waste that is removed and placed into the Luttrell Pit mine waste repository.

1. In January of each year the lead agency for any given project in the Watersheds will estimate waste volume projected to be placed in the Luttrell Pit mine waste repository as accurately as possible.

2. For each project, the lead agency will accurately measure actual waste volume placed in the Luttrell Pit mine waste repository. This will done by measuring an average volume of haul trucks and tracking the number of trucks and/or using surveying techniques to measure the actual amount removed and placed in the Luttrell Pit mine waste repository.

3. At the end of each construction season, the Agencies will agree on and document, for each project, the amount of actual waste placed in the Luttrell Pit mine waste repository.

R. The Forest Service and EPA each reserves all of their rights and authorities under CERCLA, the NCP and applicable Executive Orders, including Executive Order 12580. No provision of this MOU may be used to limit those rights and authorities.

S. NON-FUND OBLIGATING DOCUMENT. This instrument is neither a fiscal nor a funds obligation document. Any endeavor or transfer of anything of value involving reimbursement or contribution of funds between the parties to this instrument will be

handled in accordance with applicable laws, regulations, and procedures including those for Government procurement and printing. Such endeavors will be outlined in separate agreements that shall be made in writing by representatives of the parties and shall be independently authorized by appropriate statutory authority. This instrument does not provide such authority. Specifically, this instrument does not establish authority for noncompetitive award to the cooperator of any contract or other agreement. Any contract or agreement for training or other services must fully comply with all applicable requirements for competition.

T. This MOU shall not be deemed to create any right, benefit, or trust obligation, either substantive or procedural, enforceable by any person or entity in any court against the United States, its agencies, its officers, or any other person.

U. This MOU may be executed in counterparts by each of the signatories, each of which shall be deemed an original but all of which together shall constitute one and the same instrument.

V. FREEDOM OF INFORMATION ACT (FOIA). Any information furnished to the Forest Service under this instrument is subject to the Freedom of Information Act (5 U.S.C. 552).

W. MODIFICATION. Modifications within the scope of the instrument shall be made by mutual consent of the parties, by the issuance of a written modification, signed and dated by all parties, prior to any changes being performed.

X. PARTICIPATION IN SIMILAR ACTIVITIES. This instrument in no way restricts the Forest Service or the Cooperator(s) from participating in similar activities with other public or private agencies, organizations, and individuals.

Y. TERMINATION. Any of the parties, in writing, may terminate the instrument in whole, or in part, at any time before the date of expiration.

Z. COMMENCEMENT/EXPIRATION DATE. This instrument is executed as of the date of last signature and is effective through 5 (FIVE) years past the date of last signature, at which time it will expire unless extended.

The authority and format of this instrument have been reviewed and approved for signature.





AGREEMENT COORDINATOR


3/14/02
DATE


THE PARTIES HERETO have executed this instrument.

USDA, FOREST SERVICE, NORTHERN REGION

By:  3-18-02
Bradley E. Powell Date
 Regional Forester, Northern Region

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

By:  3/26/02
John F. Wardell Date
Director
Montana Office
EPA Region VIII

By:  4/4/02
Max H. Dodson Date
Assistant Regional Administrator
Office of Ecosystems Protection and Remediation
Region VIII